LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 12 1968
JOHN F. DAVIS, CLERK

APPENDIX.

Supreme Court of the United States

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,

Petitioner,

—v.—

FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED AUGUST 10, 1967
CERTIORARI GRANTED MAY 27, 1968

Supreme Court of the United States

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,

Petitioner,

—v.—

FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

	Page
Record from the Criminal Court of Record in and for Dade County, Florida	
Information for robbery, filed March 10, 1965	1
Motion to quash, filed July 19, 1965	4
Motions to suppress, filed July 19, 1965 and September 22, 1965	6
Transcript of testimony (excerpts) September 22, 1965	10
Oral motion to suppress evidence and denial thereof	10
Testimony of Loy Diehl—direct	12
Ronald Diehl—direct	16
—cross	19
Jack Kahn—direct	22
—cross	27
Defendant's motion for a new trial and denial thereof	30

Page

Opinion, District Court of Appeal of Florida, Third District, Per Curiam, filed August 9, 1966, case #65-998 31

Opinion, Supreme Court of Florida, Roberts, J., filed May 3, 1967, case #35,880 34

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari 38

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

FEBRUARY TERM, 1965

THE STATE OF FLORIDA

vs.

CARMINE VINCENT PALMIERI

INFORMATION FOR ROBBERY—Filed March 10, 1965

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that CARMINE VINCENT PALMIERI on the 6th day of February, 1965, in the County and State aforesaid, did unlawfully make an assault in and upon one LOY DIEHL and did by force and violence and putting in fear, feloniously rob, steal, take and carry away from the person, immediate possession, care, custody and control, and against the will of the said LOY DIEHL, certain monies, goods and chattels, to-wit: CASH in the sum of ONE HUNDRED DOLLARS ($100.00), good and lawful money of the United States of America, a further and more particular description of said property being to the State Attorney unknown, said property being the subject of larceny and the property of, to-wit: U-TOTE'M OF MIAMI, INC., a Florida Corporation, in violation of 813.011 Florida Statutes,

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Richard E. Gerstein
State Attorney,
Eleventh Judicial Circuit
of Florida

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

/s/ Richard E. Gerstein
State Attorney,
Eleventh Judicial Circuit
of Florida

Sworn to and subscribed before me this 9th day of March, 1965.

J. F. MCCRACKEN
Clerk,
Criminal Court of Record,
Dade County, Florida

By /s/ [Illegible]
D. C.

SEAL: CRIMINAL COURT OF RECORD

Defendant CARMINE VINCENT PALMIERI arraigned in open Court on the within Information and pleaded Not Guilty.

/s/ [Illegible]

Deputy Clerk,
Criminal Court of Record,
Dade County, Florida

Case No. .....

CRIMINAL COURT OF RECORD
DADE COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

CARMINE VINCENT PALMIERI

INFORMATION FOR ROBBERY

WITNESSES FOR THE STATE

1. Loy Diehl
   and
2. Ronald Diehl
   c/o U-Tote'M
   1265 NW 103 St.
   751-9598
3. J. Kahn DCSO
4. W. Webb DCSO
5. D. Parker DCSO

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1857 (Williams)
65-1858
65-1859
65-1860
65-1861
65-1862

THE STATE OF FLORIDA

-vs.-

CARMINE VINCENT PALMIERI

MOTION TO QUASH—Filed July 19, 1965

Defendant, through counsel, moves the Court for an Order quashing each and every of the aforesaid charges on the grounds that:

1. Defendant was originally arrested, at home, without a warrant or probable cause and was incarcerated in the Dade County Jail for some twelve days before any charges were filed against him, (and only then because of counsel's petition for a writ of habeas corpus).
2. Defendant was never afforded a preliminary examination pursuant to Chapter 902, Florida Statutes.
3. Denial of a preliminary examination to the Defendant violated his rights to due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States and Sections 11, 12 and 22, Declaration of Rights, Constitution of the State of Florida.
4. Defendant was prejudiced by denial of a preliminary examination in that, while he was unlawfully in-

carcerated without being heard to demand the nature and cause of the accusation against him, the prosecution was able to gather the only evidence herein by subjecting Defendant to repeated police lineups until evidence could be collected against him.

5. Defendant was also prejudiced in that he had the right to be heard by a magistrate and discharged, upon finding that no offense had been committed or that there was no probable cause to believe the Defendant guilty thereof. Had Defendant been taken before a magistrate pursuant to Fla. Stat. Chapter 902 upon his arrest Defendant would have been discharged as the only evidence against him was gathered *after* his arrest and while he was incarcerated.

MATTHEWS AND MANDINA
Attorneys for Defendant
608 Ainsley Building
Miami 32, Florida
CAREY MATTHEWS

[Certificate of Service (omitted in printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1857 (Williams)
65-1858
65-1859
65-1860
65-1861
65-1862

THE STATE OF FLORIDA

-vs.-

CARMINE VINCENT PALMIERI

MOTION TO SUPPRESS—Filed July 19, 1965

Defendant, through counsel, moves the Court for an Order suppressing evidence herein taken by police officers and/or Highway Patrol officers on the grounds that:

1. Such evidence was obtained in an unlawful manner, in violation of Defendant's rights to due process, guaranteed by the Fourteenth Amendment of the Constitution of the United States and of his right to be secure in his person, papers and effects as guaranteed by Section 22 Declaration of Rights, Florida Constitution.
2. The evidence in this cause was obtained while Defendant was unlawfully incarcerated in the Dade County Jail without having been afforded a preliminary examination pursuant to Fla. Stat. 902.01-.19.
3. During Defendant's incarceration, in which no charges were filed against him for some 12 days (and only then because of filing of a petition for habeas corpus by the undersigned), Defendant was placed through line-

up after lineup and evidence was gathered against him although he had been denied his rights under the aforesaid constitutional provisions and Fla. Stat. 902.01-.19 and thereby prejudiced.

MATTHEWS AND MANDINA
Attorneys for Defendant
608 Ainsley Building
Miami 32, Florida
CAREY MATTHEWS

[Certificate of Service (omitted in printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1862 (Williams)

THE STATE OF FLORIDA, PLAINTIFF

-vs.-

CARMINE VINCENT PALMIERI, DEFENDANT

MOTION TO SUPPRESS—Filed September 22, 1965

Comes now the Defendant by and through his undersigned attorneys, and moves to suppress all of the State's evidence in this cause on the grounds that all of said evidence has been obtained in violation of the constitutional rights of the Defendant; more specifically in violation of Sections 11 and 12, Declaration of Rights, Florida Constitution and Articles IV, V, VI and XIV of the United States Constitution.

Pursuant thereto Defendant alleges that he was arrested on March 1, 1965, when police officers called at his home without a warrant and brought him to the Dade County Jail for interrogation, that thereafter the Defendant was held in violation of the laws of the State of Florida, and particularly Section 901.23 thereof, and was not taken before the nearest and most accessible magistrate without unnecessary delay and in fact was never taken before a magistrate for a preliminary hearing in denial of his rights both statutory and constitutional.

Thereafter and while being illegally held without any physical evidence whatsoever of crime, although his home and person had been searched on arrest, and the Defendant was subjected to repeated interrogation and line-ups until the State succeeded in having a person identify him as an alleged participant in a robbery.

That the Defendant was illegally held for a period of ten days from March 1, 1965 to March 10, 1965, without an Information being filed charging him, and without being taken before a magistrate.

That as a result and due to the aforesaid illegal detention witnesses were proded by the State and eventually one did identify him as aforesaid and therefore said illegal detention operated to the great prejudice of the Defendant in that he was compelled to appear in line-ups against his wishes and that the only evidence which the State has in connection with this cause was obtained by reason of said illegal detention.

WHEREFORE the Defense moves for suppression of all evidence against the Defendant obtained as a result of the illegal detention. The Defendant makes no move to suppress any evidence obtained by the State other than that obtained by reason of the aforesaid illegal detention.

MATTHEWS AND MANDINA
Attorneys for Defendant
608 Ainsley Building
Miami 32, Florida
/s/ Carey Matthews

[Certificate of Service (omitted in printing)]

[1]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1862

THE STATE OF FLORIDA, PLAINTIFF

vs.

CARMINE VINCENT PALMIERI, DEFENDANT

Miami, Florida

Transcript of Testimony—September 22, 1965

* * * *

APPEARANCES:

SAM A. ALTER, ESQ., and
CHARLES D. EDELSTEIN, ESQ.,
Assistant State Attorneys,
On behalf of the Plaintiff.

CAREY MATTHEWS, ESQ.,
Of the firm of Matthews & Mandina,
On behalf of the Defendant.

* * * *

[2] MR. MATTHEWS: I would like to make a motion out of the hearing of the jury panel.

THE COURT: All of the jurors will have to leave the Courtroom and remain outside until you are called.

(Thereupon the jury panel left the Courtroom.)

THE COURT: All right. Make your motion.

ORAL MOTION TO SUPPRESS EVIDENCE
AND DENIAL THEREOF

MR. MATTHEWS: I would like to make a motion to suppress the evidence and quash the Information on the

grounds the Defendant was in repeated lineups until somebody identified him. He was arrested without a warrant, without reasonable cause, that they just went to his house and arrested him. They had no evidence against him. The arrest was invalid. They took him down to the Dade County Jail where he was invalidly held in violation of 901.23 for ten days during which they filed no Information. After ten days, they filed Informations against him, after I filed a Writ of Habeas Corpus and then they filed an Infomation; but the State has committed two crimes [3] in order to bring this man to trial. One, he has been illegally arrested. Two, he has been illegally detained in violation of Section 901.23. Naturally, this would be under the rule of the McNabb Case. He has been prejudiced. He has been prejudiced in this case. The evidence gathered against him was gathered after his arrest. There was no evidence against him when he was arrested. He was arrested to be held, interrogated, and held in lineups until the State could find some reason to charge him, which is, I would say, the most basic violation of the Constitution of the United States and the State of Florida and the Statutes of the State of Florida that could possibly occur.

Since the evidence was gathered as a result of the invalid arrest and invalid detention, we ask that it be suppressed. The only evidence is that he was picked out of the lineup God knows how many days after he had been illegally arrested and illegally detained. It is our contention the State has no right to do that.

THE COURT: They may not have a right. Do you have any Case Law that says—that throws out any lineups?

MR. MATTHEWS: No, not to this particular situation. It has arisen in the cases of Mowery and McNabb, [4] and the State cases usually say there has to be some prejudice. They have to go on the fact the Defendant hasn't been prejudiced and in this case, he has been prejudiced by his arrest.

THE COURT: It may be our State Courts have never said just what the circumstances would be for prejudice.

MR. MATTHEWS: But unless they have attached significance to the facts in the cases that have come to the attention of the Florida Supreme Court, there has been a prompt filing by the State Attorney which, of course, would be the alternate method to proceed, so they have indicated this was part of their reason for finding no prejudice, a prompt filing on it as far as the State Attorney, but this is an exact reverse situation here where ten days passed before filing, and then the filing was only as a result of a Habeas Corpus filed by the Defendant, so we take away from the prior Florida cases the situation of prompt filing.

We also add to the Florida cases a situation of the most high possible prejudice to the Defense in that there was no evidence until after he was arrested, and that his incarceration was the manner by which the evidence was obtained. He was repeatedly put in lineups against [5] his protest until finally somebody identified him. There is no other evidence except his identification from the lineup obtained after the invalid arrest and the invalid detention took place.

THE COURT: The motion is denied.

* * * *

[12] LOY DIEHL

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTER:

* * * *

[26] Q Now, would you indicate what, if any, physical characteristics you took notice of particularly with regard to this man who held the gun on you?

A Yes, I got a very good look at his face.

Q Could you describe his face?

A Yes, he had a prominent nose, a shallow chin, thin [27] chinline. He had a stub of a beard. At that time, he had pimples on his face and his hair was long and

curly back here, very bad need of a haircut. I could tell his hair was curly because of the ringlets that were back there.

Q His hair was protruding from the hat?

A Protruding from the hat, yes.

Q How tall was he?

A Five six.

Q Now, you say that rather positively. Have you ever had any experience in your life with regard to identifying persons?

A Yes.

Q What did that consist of?

A Well, in the Marine Corps I was in the Military Police.

Q How long was that?

A Three years.

Q Did you have any specific police-type training that you received in that connection?

A Yes, sir, the Marine Corps paid for a course through the Marine Corps Institute of Criminal Investigation.

Q Did any portion of that course involve identification?

[28] A Yes, a major part of it involved identification.

Q Based upon your observations of this man, could you with any degree of accuracy indicate his approximate weight?

A Yes. At that time, it was—

MR. MATTHEWS: Object to that question. The man isn't qualified as an expert to say what anyone's weight is. I don't know anyone is qualified as an expert to say that. Certainly, there is nothing to indicate the witness is unless he is a carnival man.

THE COURT: Overruled.

Q (By Mr. Alter) Mr. Diehl, could you, with any degree of accuracy, estimate the weight of the man?

A One hundred and thirty pounds.

Q Now, from your physical observations of him and everything that you took notice of, could you, with any degree of accuracy, estimate his age, his apparent age, if you recall from that time?

A No, not with any accuracy.

MR. MATTHEWS: Excuse me. I didn't hear that question. Would you read that question back?

[29] (Thereupon the question and answer referred to were read by the Reporter as above recorded.)

Q (By Mr. Alter) Did you have an opportunity to observe his manner of walking or his gait?

A Yes. When he followed us down the aisle, his gait was a very wide gait, very wide.

Q How much conversation did you have with him all together?

A Very little.

Q Was there anything noticeable about his manner of speech?

A Yes, very definitely, I would call it a Brooklyn accent.

Q Have you ever known anybody from Brooklyn or that area—

A Yes.

Q —that have spoken in a similar fashion?

A Yes, I have.

Q Were there any other distinguishing features that you took notice of of this individual at the time?

A I tried to remember as much as I could but I believe that is it.

• • • •

[32] Q And did you, in connection with this loss, make any certain reports to your supervisor or member of the store?

A Yes, I also called my supervisor.

Q Was that on the same day?

A Immediately after I called the police.

Q Let me ask you this: Do you see the holdup man in this Courtroom today, Mr. Diehl?

[33] A Yes, I do.

Q Would you get up and walk over to the man?

A This is the man.

MR. ALTER: Indicating the Defendant.

Q (By Mr. Alter) Is there an appreciable difference in his appearance today as compared to his appearance as you recall it back on the 6th of February?

A He is heavier.

Q How about the complexion?

A Same complexion.

Q How about the hair, as much as you could see it?

A The hair was just a little bit longer then.

Q Is there any question in your mind but that this is the same person?

A This is the same person.

MR. ALTER: Let the record reflect that the witness identified the Defendant, Carmine Vincent Palmieri.

Do you want to have a seat again?

THE COURT: Take the stand.

Q (By Mr. Alter) Now, in connection with your reporting this matter to the police, after the initial report [34] to the initial officer that same day, were you subsequently contacted by any other members of the police department?

A Yes, I was, Detective Kahn.

Q Now, can you recall when you first had contact with him?

A Yes, Detective Kahn brought a number of photographs to the store one evening when I happened to be working and asked me to make an identification if I could from any of the photographs that he had.

Q How many photographs did he bring?

A It was a number of them, over a half a dozen.

Q And did you view those photographs?

A Yes, I viewed them and picked out one.

Q And do you recall how long after the robbery this was?

A Several days.

Q Did you have any further contact with any investigating officers in connection with this matter?

A Yes, it was a couple of weeks later that I was called early in the morning for a lineup.

Q About what time of the day or night was it that you received this call?

[35] A I received the call about 1:30 in the morning.

Q And where did you go in response to this call?

A To the Justice Building or Metropolitan Building over here. I am not sure exactly what it is.

Q And what occurred at that time, Mr. Diehl?
A I was asked to make an identification from the lineup.
Q Now, can you describe in your own words how this lineup was conducted and what occurred?
A Yes, there is two rooms. One room has a one-way glass in it. It is a small room for the person who is going to do the identifying to stand; and then, the people in the lineup are in the larger part of the room. It is well lighted and they are all numbered.
Q Now, was there anybody with you at the time you viewed the lineup?
A Yes, Detective Kahn.
Q Did you receive any specific instructions with regard to viewing the lineup?
A Only to stand back well away from the glass because of the reflection in it.
[36] Q And how long did you view the lineup?
A Ten minutes all together.
Q How many people were in the lineup?
A Six.

* * * *

[65] RONALD DIEHL

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTER:

* * * *

[70] Q Could you indicate to us about how long all of this took, that is to say, from the first time you saw this robber until he was gone?
A About five minutes.
Q And out of that five minutes, you had him under your observation for about how long?
A About one to two minutes.
Q What did the robber say to you, if anything, just prior to the time he left?

A He told us to go into the back room and said, "Now, relax and have a cigarette and don't come out hollering."

Q Is that what you and your father did?

A Yes, sir, we remained there for about a minute and then we came out and called the police.

Q When you came out and called the police, was there anybody in the store at all?

A No, sir.

Q Now, at any time later, were you ever contacted by any of the investigating officers?

A Yes, sir.

[71] Q Do you recall who that was that contacted you?

A No, sir, I don't.

Q Did you ever have occasion to go with the police down to the Sheriff's Office?

A Yes, sir.

Q Do you remember when that was approximately?

A Three or four weeks after the robbery.

Q And what happened when you went down to the Sheriff's Office then?

A They had a lineup and they wanted me to see if I could identify the man.

Q And how many people were in that lineup?

A I believe there were five.

Q Now, when you viewed the lineup, could you tell us what the physical setup was, how you went about doing that, where the people were lined up, and where you were?

A They were on sort of a stage platform and between me and them was a screen and I was on one side of darkness and they had bright lights shining in their faces.

Q Was there anybody in the viewing area with you at that time?

[72] A Yes, there was an officer.

Q Have you seen him here today?

A Yes, sir.

Q Do you know his name?

A I believe it was Detective Kahn.

Q Now, did he give you any specific instructions as to what you were to do when you were viewing the lineup?

A No, he just told me to notice each one as they went through the different steps and not to say anything until they were all finished.

Q So how long did you look at these people in the lineup?

A About three, four minutes.

MR. ALTER: I would like to have this marked as State's Exhibit 1-B for Identification.

(The document referred to was thereupon marked "State's Exhibit 1-B for Identification.")

Q (By Mr. Alter) Ronnie, I am going to show you State's Exhibit 1-B for Identification, a photograph, and ask you if that accurately represents the individuals who were in that lineup that you observed?

A Yes, sir.

Q Did you identify any of the people who are depicted [73] in that picture?

A Yes, I did.

Q And does that particular individual bear a number?

A Yes, sir.

Q And what number is that?

A It is number five.

* * * *

[74] Q Did anybody tell you to pick out any certain one of these people in that lineup?

A Oh, no, sir.

Q After the robbery took place, did anybody ever give you any instructions or further description of the holdup man?

A No, sir.

Q Now, you have indicated that the holdup man was dressed all in black. Just briefly, if you could describe his clothing for us.

A Well, he had on black shoes and socks, black trousers, and he had on a black trenchcoat and he had a derby-like hat with a small rim or brim or something like that and dark sunglasses.

Q How close in feet did you ever come to this individual at the time of the holdup?

A Do you mean the closest?

Q Yes.
A Two feet.
Q Did you have an opportunity to look at him at that time?
A Yes, sir.
[75] Q Now, Ronnie, do you see that individual in the Courtroom today?
A Yes, sir.
Q Could you get up from the witness chair—
THE COURT: He doesn't have to get up. Just point him out, if you will.
THE WITNESS: The Defendant, right there.
MR. ALTER: Let the record reflect the witness has identified the Defendant, Carmine Vincent Palmieri.

* * * *

[76] CROSS EXAMINATION

BY MR. MATTHEWS:

* * * *

[81] Q When was the first time you talked to the police about the robbery you yourself?
A Well, about five to ten minutes after the robbery, a policeman came to fill out a report.
Q And you gave him your story?
A Yes, sir.
Q And your father gave his at the same time?
A Yes.
Q And you were both there together and gave your stories together?
A Yes.
Q After that occasion, when was the next time that you talked to the police about the case?
A Oh, that same day, a man came in.
Q When?
A A little after noon and he took me down to the police station to identify somebody that they thought was the bandit.
Q Right.
[82] A And I looked at him and it wasn't.
Q Did your father go with you on that occasion?

A No, sir.

Q Did you give your story to your father's supervisor at the time of the robbery when he came to the store?

A No, sir, I did not.

Q Were you there when the supervisor came?

A No.

Q Any reason why you didn't tell him the story?

A I just wasn't asked any questions. He was asking my father about it.

Q Were you there when your father spoke to the supervisor?

A Yes, sir, I was.

Q And you heard your father's story?

A Yes.

Q After the occasion when you went down for the first time to see the police downtown, when was the next time that the police had you out on this case?

A About three weeks later.

Q Was that the time when you said you saw the line-up?

[83] A Yes.

Q And who took you downtown?

A My father did.

Q You went down with your father?

A Yes.

Q To the same lineup?

A No, sir.

Q You and your father went downtown to this lineup?

A He took me down to see a lineup myself.

Q You rode down together in the car?

A Yes, sir.

Q Did you discuss the crime?

A No.

Q Didn't talk about it at all?

A He just told me to be sure before I picked out anybody. That is all.

Q Do you know whether at this time he had already picked somebody out?

A Yes, he did.

Q He had already picked somebody out?

A Yes, sir.

Q And did he describe to you who he picked out?
A No, sir, he did not.
[84] Q He didn't tell you who he picked out?
A No, sir.
Q He didn't tell you at all?
A He just told me that he had picked out the man.
Q He didn't tell you anything about the man's description?
A No, sir, he did not.
Q Didn't talk about him being five foot six?
A No, sir.
Q I noticed that you said that the man you identified today in Court, the Defendant, you said that he appeared heavier to you?
A Yes, sir.
Q Have you discussed today with your father the appearance of the Defendant?
A Briefly, yes.
Q Did you both agree that he looked heavier?
A Yes, sir.
Q On the day of the lineup when you got down there, was your father with you?
A Yes.
Q And Detective Kahn?
A In the actual lineup, my father was outside.
[85] Q Where was Detective Kahn?
A He was in there with me in the lineup.
Q What did Detective Kahn say as he ran them through for you?
A He instructed me to watch each man as he went through the motions and not to make a permanent decision until all of them had gone through it.
Q Did he tell you the one your father picked out?
A No, he did not.
Q In the hallway before you took a look at the lineup, did you discuss the question of the lineup with Detective Kahn and your father?
A With Detective Kahn.
Q What about your father?
A No, sir.
Q Actually, you picked the smallest man in the lineup, did you not?

A Yes.
Q Is that why you picked him?
A No, it isn't.
Q That was a factor in it, wasn't it?
A Yes.
Q How many men were in the lineup?
A I believe there were five.
[86] Q Were the rest of the men in the lineup other than the one you picked out quite husky? They were quite husky, were they not?
A No, sir, they weren't.
Q What I mean by husky, I mean, they were sturdy?
A I believe one or two of them were.
Q Were there any there that were very thin and light?
A No, sir.
Q Just the one you picked?
A Yes, sir.
MR. MATTHEWS: That is all.
MR. ALTER: Nothing further of this witness.
Thereupon—

JACK KAHN

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EDELSTEIN:

Q Mr. Kahn, will you tell the jury your full name and residence address.
A Jack Kahn; 8872 Jodie, Des Plaines, Illinois.
[87] Q How long—Are you employed at the present time?
A I am General Manager of the Sinclair Machinery Company, Chicago, Illinois.
Q And prior to this job, did you have any jobs in the Florida area?
A Yes, sir, I did.
Q And where was that?

A I was a Deputy Sheriff right here in Dade County, Florida.

Q And how long were you so employed?

A Seven years.

Q What was the date when you left the Sheriff's Office?

A July 31, 1965.

Q For what reason did you leave the Sheriff's Office?

A I was recently married and my father-in-law offered me a position with his company which I accepted, a better future, I thought.

Q In the course of your official duties in the month of March of last year, did you have occasion to conduct a lineup?

A Yes, sir, I did.

Q Did that lineup include the Defendant in this case, [88] Carmine Vincent Palmieri?

A Yes, sir, it did.

Q Is he in this Courtroom today?

A Yes, sir.

Q Would you point him out?

A Right over there.

MR. EDELSTEIN: For the record, indicating the Defendant.

Q (By Mr. Edelstein) Tell me, do you notice any difference between the Defendant's physical appearance today and his physical appearance back in March when you held the lineup?

A Not greatly, maybe just in the coloring, which is obvious, sir.

Q Now, when you conducted this lineup, how many men were in the lineup?

A I believe six.

Q Now, I am referring first to the lineup which took place when Mr. Diehl, the older Mr. Diehl, identified Mr. Palmieri. How many men were in that lineup?

A I believe six, but I would have to see the photograph.

Q When you were at that lineup, did you give any instructions to Mr. Diehl?

[89] A None whatsoever. The only instructions I did give him was to view the lineup, take his time, and be sure, and that if he recognized the individual who held him up, to please tell me his number.

Q Now, did he in fact identify the Defendant Palmieri?

A Yes, he did.

Q Now, were there any pictures taken of this lineup?

A Yes, there was.

Q And who took the pictures?

A I did.

Q I show you State's Exhibit 1-A and ask you if you can identify it?

A Yes, this is the picture I took in the Sheriff's office lineup room right over here on 14th Street.

Q Now, in the picture, which one is the Defendant in this case?

A Number three.

Q And this picture is from which lineup?

A This is the first lineup which occurred March the 2nd at 2:30 in the morning which the senior Mr. Diehl observed.

Q Now, is that picture an accurate representation of [90] the lineup as you conducted it?

A Yes, it is.

Q Now, you say there was a second lineup?

A Yes.

Q When did this take place?

A I believe approximately six days later, to be exact, March 8, 1965, as the lineup plat indicates.

Q Were you present at this lineup?

A Yes, sir.

Q Was the Defendant present at that lineup?

A Yes, sir.

Q Now, did you conduct that lineup?

A Yes, sir, I did.

Q And did you take any pictures of that lineup?

A Yes, sir.

Q Did you take that picture of that lineup? I mean State's Exhibit 1-B?

A Yes, sir.

Q Does that picture clearly and accurately depict the lineup as you viewed it?

A Yes, sir.

Q All this took place in Dade County, Florida?

A Yes, sir.

[91] Q And both these pictures were taken pursuant to your official duties as a police officer?

A That is correct.

MR. EDELSTEIN: Nothing further, Judge.

I would move to introduce those pictures into evidence.

MR. MATTHEWS: Are you offering them now?

MR. EDELSTEIN: Yes.

MR. MATTHEWS: I object to them both, your Honor, and may I ask a few questions of Detective Kahn?

THE COURT: Yes.

MR. MATTHEWS: Detective Kahn, I show you State's Exhibit No. 1-B for Identification and ask you where that was taken?

THE WITNESS: This picture was taken in the hallway or the foyer of the jail.

MR. MATTHEWS: Out by the elevators?

THE WITNESS: Yes, sir.

MR. MATTHEWS: That is not where the person looked at the lineup, is it?

THE WITNESS: No.

MR. MATTHEWS: All right, your Honor, I object to it. It does not depict the actual lineup, that it is actually a photograph taken in the hallway somewhere.

MR. EDELSTEIN: Not somewhere. It is in the Dade [92] County Justice Building.

This State's Exhibit 1-B, this picture was taken where?

THE WITNESS: This was taken in the hallway where the lobby is, and the reason it is taken there—

MR. EDELSTEIN: Address it to the jury so they can hear you.

THE WITNESS: The reason we have to take it here is because the lineup room in the jail is a small room and we cannot take a accurate photograph because of the screen; and in order to take the photograph like this, we have to stand back approximately twenty feet; and if we stand back twenty feet in the jail lineup room, the

screen distorts the photograph, so we just march them out of the room and into the hall and take the picture after the identification is made.

MR. EDELSTEIN: And do they march out in the same order as when the identification is made?

THE WITNESS: Yes, sir.

MR. EDELSTEIN: I have nothing further, and the State once again moves to introduce into evidence both pictures.

MR. MATTHEWS: Right now I am directing my attention to State's Exhibit 1-B and this has been represented to the jury as depicting the lineup. Now, the [93] State's witness, the young gentleman, told this jury this is what he saw. Actually, your Honor, we have the testimony of Detective Sgt. Kahn that this is not what he saw. This is a picture taken elsewhere and is not a photograph of the lineup; and the witnesses have previously testified that this is an accurate reproduction of what they saw in the lineup and it is not, if your Honor please, and I ask it not be received into evidence. It is just not what the State's witnesses have claimed it was. They said this is what they saw and it obviously isn't, and anyone can see it is a picture taken in the hallway. It is not the lineup.

MR. EDELSTEIN: Without getting into extensive argument, the State feels there is no reason why these pictures can't go to a jury. We are not attempting to withhold any kind of evidence.

THE COURT: Just a moment.

Mr. Kahn, you say those are exactly in the same order as when viewed by the witnesses?

THE WITNESS: Yes, sir, and we have a corresponding sheet to show the order in which they stood; and I believe the State Attorney has the sheet that goes with this photograph.

MR. MATTHEWS: If your Honor please, the Defense has further objections. The witness, Detective Kahn, has [94] brought up there is something about the shape of the room and the sheet or screen or whatever it is and that is the reason why they can't take the picture. Now, if there is something about the room that you can't take

a picture accurately, then how can somebody looking into the room see accurately. I mean, it just is not what the person sees when he looks through that screen, which Detective Kahn has testified to, and if they are going to introduce a picture of a lineup, it has to be what the man sees. If there is a distortion and they don't want to take a picture of the distortion, as I understand the testimony of Detective Kahn, the jury should know it and this picture shouldn't be put into evidence as to what a man sees through that lineup screen when it isn't.

Further, the fact that these men are in the alleged order they were in in this so-called lineup room, God knows what kind of gear they had on, hats, outfits, wigs, etc. I don't know. All he has testified to is that they are in the same order; and your Honor, that is not an accurate depiction of the lineup they saw, that they testified they saw, and now we find out they didn't see it and here they told you it was exactly what they saw.

THE COURT: Well, the Court is going to admit it [95] into evidence as State's Exhibit 1.

(The photograph referred to was thereupon marked "State's Exhibit 1.")

MR. MATTHEWS: We have the same objection to State's Exhibit 1-A for Identification.

THE COURT: Overruled. Admitted into evidence as State's Exhibit No. 2.

(The photograph referred to was thereupon marked "State's Exhibit 2.")

MR. EDELSTEIN: I have nothing further of this witness.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. MATTHEWS:

Q Detective Kahn, you brought down Mr. Loy Diehl, did you not, in the middle of the night to see the lineup?

A Yes, sir.

Q What day was that?

A March the 2nd. He came down pursuant to a phone call from myself.

Q And the other lineup, what was the date of it that you brought down his son, do you recall?

A His son came down, I believe, on March the 8th.

[96] Q When did you arrest the Defendant?

A When did I arrest the Defendant?

Q Yes.

A I didn't arrest him. He was arrested by my authority.

Q What date?

A March the 2nd or March the 1st. I am not sure. I think it was March the 1st at approximately 1:30 a.m.

Q He was arrested under your authority pursuant to your authority?

A Yes.

Q Did you present him for preliminary hearing before any magistrate or judicial officer?

A No, sir.

Q Now, Detective Kahn, as a law enforcement officer, are you familiar with the state law that requires he be produced before a magistrate without unreasonable delay?

A Sure. This is late at night.

MR. EDELSTEIN: Excuse me. I have to object to this.

THE COURT: Sustained.

MR. MATTHEWS: Your Honor, it is very material as to the bona fide character of the lineup.

[97] I am trying to show that this entire lineup is subject to question, that the manner of his detention and the lineup itself is subject to question.

THE COURT: It is a legal proposition which you already have in the record.

MR. MATTHEWS: I am trying to impeach the lineup.

MR. EDELSTEIN: We argued this before.

MR. MATTHEWS: I am not claiming a legal dispute. I am trying to impeach the lineup per se. I am

trying to say that the lineup was not held in a legal normal fashion.

THE COURT: That is something that is not for the jury to determine about the legality of the lineup.

MR. MATTHEWS: Not the legality, but whether it was accurate and fair is certainly a question.

MR. EDELSTEIN: Judge, if the Court please, if we are going to argue this thing further once again, could we do it out of the presence of the jury? We are not arguing a matter of fact, we are arguing a matter of law and the law is for you to decide and the facts are for the jury to decide. Now, we argued it once before.

MR. MATTHEWS: I would like the jury to hear [98] all the facts.

THE COURT: But you are arguing law now which doesn't concern the jury.

MR. MATTHEWS: Do you wish me to discontinue that line of questioning?

THE COURT: You can go into the circumstances, but not the question about the committee magistrate.

MR. MATTHEWS: All right.

Q (By Mr. Matthews) Prior to taking Mr. Diehl, Sr. down, had you shown him pictures of various persons—

A Yes.

Q —out of your folders?

A Yes, sir.

Q Had you done it with Mr. Diehl, Jr.?

A No, sir.

Q Did you discuss prior to Mr. Diehl, Jr. viewing the lineup the makeup of the lineup with him, who was going to be in the lineup or anything of that nature?

A No, sir.

MR. MATTHEWS: I don't think I have any further questions.

MR. EDELSTEIN: Nothing further from this witness.

* * * *

[129] Miami, Florida
September 27, 1965

* * * *

[130] MR. MATTHEWS: Your Honor, the Defense has a motion for a new trial.

THE COURT: All right. Proceed.

MR. MATTHEWS: Comes now the Defendant and moves for a new trial upon the following grounds, that the verdict is contrary to the law, contrary to the evidence, contrary to the law and evidence, that the Court erred in failing to allow the Defendant to proceed with questioning of the State's witnesses as to the illegal detention of the Defendant in violation of Statute 901.23 of the Florida Statutes to the prejudice of the Defendant, that the Court erred in permitting into evidence photographs of the lineup to the prejudice of the Defendant, and that the Court erred in failing to grant the motion to quash and motion to suppress all evidence based on the illegal detention of the Defendant in violation of Section 901.23 of the Florida Statutes, all to the prejudice of the Defense, inasmuch as there was no material evidence other than that obtained subsequent to the illegal detention.

THE COURT: Motion denied.

* * * *

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 65-998

CARMINE VINCENT PALMIERI, APPELLANT

vs.

THE STATE OF FLORIDA, APPELLEE

An Appeal from the Criminal Court of Record for Dade County, Gene Williams, Judge.

Matthews & Mandina and Michael Lipsky, for appellant.

Earl Faircloth, Attorney General and Barry N. Semet, Assistant Attorney General, for appellee.

Before PEARSON, BARKDULL and SWANN, JJ.

Aug. 10, 1966

PER CURIAM—Opinion filed August 9, 1966

This is an appeal from a judgment, upon conviction of robbery, in the Criminal Court of Record for Dade County. The judgment was entered pursuant to a jury verdict, and the defendant was sentenced to a term of 20 years in prison.

On Monday, March 1, 1965, the defendant was arrested at his home without a warrant and was incarcerated in the Dade County Jail where he was interrogated. Defendant was never taken before a committing magistrate.

He was identified by a prosecution witness (Loy Diehl) at a line-up which was held at the County Jail on March 3, 1965.

On March 10, 1965, after defendant had filed a petition for writ of habeas corpus, the State filed an information charging him with robbery.

At the trial, the case for the prosecution consisted of the testimony of Loy Diehl (the operator of the store that was robbed) and his son, Ronald, and their identification of the defendant; the testimony of the law enforcement officer who had ordered the defendant's arrest and had conducted the line-ups; and the testimony of the officer who had made the initial investigation.

Appellant has presented two points as follows:

> "Point I. Whether the defendant's detention for ten days, upon an arrest without a warrant, and without his being taken before a magistrate, while incriminating evidence was gathered against him from repeated lineups, amounted to a denial of due process of law pursuant to the Florida Constitution, Section 12, Declaration of Rights and United States Constitution, Fourteenth Amendment.
>
> "Point II. Whether there was insufficient evidence to support the verdict."

Appellant admits that the appellate courts of this State have frequently held that a defendant has not been denied due process of law where evidence has been obtained from him prior to a preliminary hearing. See Milton v. Cochran, Fla. 1962, 147 So.2d 137; Montgomery v. State, Fla. 1965, 176 So.2d 331.

Appellant urges that his case goes beyond the cases cited because the record demonstrates that the violation of Section 901.23,[1] Fla. Stat. 1963, resulted in a grave prejudice to him in his defense. It is urged that if the directions of the statute had been followed, the magistrate would have been required to release the defendant for lack of probable cause to retain the defendant in jail.

---

[1] Section 901.23, Fla.Stat. 1963, provides:

Duty of officer after arrest without warrant.—An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if the magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

It is pointed out that the evidence against the defendant was procured at the jail subsequent to the time at which the appellant would have been released if he had been taken before a magistrate. On this basis, appellant urges that reversal is required under the decisions of the Supreme Court of the United States in McNabb v. U. S., 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, and Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801. See also People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960), and Vorhauer v. State, Del. 1965, 212 A.2d 886.

Appellant's point appears to have been decided against him by our opinion in Shea v. State, Fla. App. 1964, 167 So.2d 796. See also DiBona v. State, Fla. App. 1960, 121 So.2d 192. We therefore adhere to our prior opinion on this point.

Appellant's Point II is without merit once it is determined that the evidence obtained at the line-up was admissible.

Affirmed.

IN THE SUPREME COURT OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.
May 5, 1967

Case No. 35,880

CARMINE VINCENT PALMIERI, PETITIONER

vs.

STATE OF FLORIDA, RESPONDENT

Writ of Certiorari to the District Court of Appeal, Third District

Michael A. Lipsky and Matthews and Mandina, for Petitioner

Earl Faircloth, Attorney General, and Barry N. Semet, Assistant Attorney General, for Respondent

ROBERTS, J.—Opinion filed May 3, 1967

The District Court of Appeal, Third District, affirmed a judgment of the trial court based on a jury verdict convicting petitioner Palmieri of robbery. The cause was certified to this court under Article V, Section 4(b), of the Constitution of Florida, in that the decision passed upon a question of great public interest because "it concerns a determination of when the denial of a preliminary hearing in violation of § 901.23, Florida Statutes, is prejudicial to a defendant." On application of the petitioner a writ of certiorari was issued.

The defendant was arrested at his home about 1:30 in the morning without a warrant, was not taken before a committing magistrate, but was incarcerated in the Dade County jail. The next day he was identified in a lineup at the jail by a prosecution witness. Ten days after the arrest and after he had filed a petition for writ of habeas corpus, the state filed an information charging him with robbery. The jury found him guilty and he was sentenced to twenty years in prison.

Appellant Palmieri presented two points to the district court which are under review here:—

"(1) Whether the defendant's detention for ten days, upon an arrest without a warrant, and without his being taken before a magistrate, while incriminating evidence was gathered against him from repeated lineups, amounted to a denial of due process of law pursuant to the Florida Constitution, Section 12, Declaration of Rights, and the United States Constitution, Fourteenth Amendment.

"(2) Whether there was insufficient evidence to support the verdict."

The district court determined in reference to point (1) that the evidence obtained at the lineup was admissible, and that therefore point (2) was without merit.

The cases petitioner relies on in seeking a reversal of the trial and district courts are: McNabb v. United States (1943), 318 U.S. 332, 63 S.Ct. 608; Watts v. Indiana (1949), 338 U.S. 49, 69 S.Ct. 1347; People v. Hamilton (1960), 359 Mich. 410, 102 N.W.2d 738; Vorhauer v. State (1965), 212 A.2d 886. These decisions are not decisive of this case inasmuch as they involve admission of extra-judicial confessions and the due process clause of the Fourteenth Amendment which makes the exclusionary rule mandatory *in federal cases.*

Petitioner contends that "due process of law should be extended to include a right to a preliminary hearing in the State of Florida upon a charge of a felony" and contends that had he been so presented, the magistrate would have released him inasmuch as the evidence against him was procured at the jail *subsequent* to his incarceration. He thus reasons that the failure to follow § 901.23, F.S. (the preliminary hearing statute) was prejudicial to him. The statute provides:—

> "An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs,

having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

It is apparent that the defendant should have been taken before a magistrate without unnecessary delay under the statute. The attorney general has stated "the statute should be complied with", Op.Atty.Gen.—048-73; the federal courts have ruled in the above cited McNabb case, and Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, that the failure to comply is a denial of *due process under federal law;* and we have noted that the continued failure of officers to comply cannot be condoned, Milton v. Cochran (Fla. 1962), 147 So.2d 137. However, under this statute a preliminary hearing is for the purpose of determining if probable cause exists to hold one accused of a crime for trial. Rouse v. State (1902), 44 Fla. 148, 32 So. 784; Davis v. State (Fla. 1953), 65 So.2d 307; Baugus v. State (Fla. 1962), 141 So.2d 264. It is not an indispensable prerequisite to the filing of an information, DiBona v. State (Fla.App.1960), 121 So.2d 193; Davis v. State, supra, and is not a necessary step in criminal proceedings. Shea v. State (Fla. App.1964), 167 So.2d 796; Baugus v. State, supra. "A prosecution may be instituted and maintained regardless of whether such a hearing is or is not held, and regardless of whether probable cause to hold the accused for trial is or is not found." Montgomery v. State (Fla. 1965), 176 So.2d 331, 384 U.S. 1023 (cert. denied).

A plea of not guilty was entered, no admissions were made, the *defendant did not ask to be taken before the magistrate,* did not testify at the trial, and no question of illegal arrest was involved on appeal. It therefore appears to us that there has been no showing of prejudice and that to reverse both the trial court's judgment which was based on a jury verdict, and the subsequent affirmance by the district court, would constitute a miscarriage of justice.

Furthermore, § 54.23, Florida Statutes, provides:—

> "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or *criminal*, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed." (Emphasis supplied.)

And § 924.33, F.S. provides:—

> "No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."

No harmful error appearing, the decision of the district court here under review is approved and the writ of certiorari heretofore issued is discharged.

It is so ordered.

THORNAL, C.J., THOMAS, DREW and O'CONNELL, JJ., concur.

SUPREME COURT OF THE UNITED STATES

No. 585 Misc., October Term, 1967

CARMINE VINCENT PALMIERI, PETITIONER

v.

FLORIDA

On petition for writ of Certiorari to the Supreme Court of the State of Florida.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—May 27, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1469 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 312919 18

LIBRARY
SUPREME COURT, U. S.
AUG 20 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,
Petitioner,

vs.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

PHILLIP GOLDMAN
14th Floor First National Bank Building
Miami, Florida 33131
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

INDEX

Subject Index

Brief for the Petitioner 1

Opinion Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Question Presented 3

Statement of the Case 4

- Arrest, Line-Ups and Arraignment 4
- Trial and Conviction 5
- The Decision of the District Court of Appeal of Florida, Third District 5
- The Decision of the Supreme Court of Florida 6

Summary of Argument 7

Argument 9

- The McNabb-Mallory Rule Presently Applicable to Federal Courts Should Be Applied to State Court Proceedings As a Constitutional Mandate 9
- The Illegal Line-Ups 16
- Prejudicial Error 18
- The Totality of Circumstances in This Cause Requires a Reversal under the Mandate of the Fourteenth Amendment to the Constitution of the United States 20

Conclusion 22

Appendix—Pertinent Constitutional and Statutory Provisions A1

Authorities Cited

CASES

Brown v. *Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L. Ed. 682 14

Canty v. *Alabama*, 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988 14

Carnley v. *Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 19

Chambers v. *Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 14

Escobedo v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 977 ..... 12, 13

Gallegos v. *Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L. Ed. 86 ..... 11, 12

Gideon v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 ..... 12, 13, 16

Gilbert v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 ..... 13-14, 16

Lomax v. *Texas*, 313 U.S. 544, 61 S.Ct. 956, 85 L.Ed. 1511 14

McNabb v. *United States of America*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 ..... 9, 10, 11, 12, 14, 16, 20, 21-22

Mallory v. *United States of America*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 ..... 9, 10, 11, 14, 16, 18, 20

Milton v. *Cochran*, Fla., 147 So.2d 137 10

Miranda v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 ..... 12, 13, 19

Olmstead v. *United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 16

Parker v. *State*, Miss., 141 So.2d 546 11

People v. *Hamilton*, 359 Mich. 410, 102 N.W.2d 738 11

People v. *Novak*, 33 Ill.2d 343, 211 N.E.2d 235 11

Rochin v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 ..... 20, 21

State v. *Evans*, Haw., 372 P.2d 365 11
State v. *Hodge*, 252 Ia. 449, 105 N.W.2d 613 11
State v. *Hodgson*, 44 N.J. 151, 207 A.2d 542 11
State v. *Hoffman*, Wash., 392 P.2d 237 11
State v. *Hudson*, 89 Ariz. 103, 358 P.2d 332 11
State v. *Nelson*, Mont., 362 P.2d 237 11
Stoval v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 ..... 16, 20
United States v. *Klapholz*, 2d Cir., 230 F.2d 494, cert. den., 351 U.S. 924 9
United States v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 ..... 13, 16
Vernon v. *Alabama*, 313 U.S. 547, 61 S.Ct. 1092, 85 L.Ed. 1513 14
Vorhauer v. *Delaware*, Del., 212 A.2d 886 11
Ward v. *Texas*, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 14
Watts v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 ..... 13, 14, 15
White v. *Texas*, 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342 14

Constitutional and Statutory Provisions Cited

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Fifth Amendment 2
Sixth Amendment 2
Section 1, Fourteenth Amendment 2, 8, 20

Florida Constitution:

Section 4(2), Article V 2, 6

STATUTORY PROVISIONS:

28 U.S.C., Section 1257(3) 2
2 Fla.Stat. 1957, p. 3850, Sec. 901.23 ..... 2, 3, 6, 18

Rules Cited

Federal Rules of Criminal Procedure, Rule 5(a) 7, 9, 16

Law Reviews Cited

Broeder, *Wong Sun—A Study in Faith and Hope*, 42 Neb.L.Rev. 483, at 564, et seq. 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,
Petitioner,

vs.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER[1]

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District (A 31-33), is reported at 189 So.2d 512. The decision of the Supreme Court of Florida (A 34-37) is reported at 198 So.2d 633.

1. In this brief the following symbols will be used:
"A" for printed Appendix;
"R" for original Record on Appeal.
All emphasis in this brief is supplied unless otherwise indicated.

JURISDICTION

Jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1257(3).

On August 9, 1966, the District Court of Appeal of Florida, Third District, rendered its Final Judgment affirming the conviction of the Petitioner for armed robbery. Ordinarily this would terminate appellate review, but in this instance the District Court of Appeal certified to the Supreme Court of Florida, under Article V, Section 4(2) of the *Constitution of Florida*, that the decision passed upon a question of great public interest because "it concerns a determination of when the denial of a preliminary hearing in violation of Section 901.23, Florida Statutes, is prejudicial to a defendant."

On May 3, 1967, the Supreme Court of Florida entered its Final Order approving the decision of the District Court of Appeal (A 34-37), thereby rejecting Petitioner's claim that he is imprisoned in violation of the Due Process Clause of the Fourteenth Amendment (A 34-37). Petitioner's Motion for Leave to Proceed in Forma Pauperis and his Petition for Writ of Certiorari were filed on August 10, 1967. This Court granted the Motion and Petition on May 27, 1968.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix. This case involves the Fifth, Sixth, and Section 1 of the Fourteenth Amendments, *Constitution of the United States*, and the following Florida Statutes:

2 Fla. Stat. 1957, p. 3850, Sec. 901.23 (*Duty of Officer After Arrest Without Warrant*).

QUESTION PRESENTED

The Petitioner was arrested at his home at about 1:30 in the morning without a warrant, was not taken before a committing magistrate as required by statute, Section 901.23, *Florida Statutes*, but was incarcerated in the Dade County jail. The next day he was identified in a line-up at the jail by a prosecution witness. About a week later he was identified in another line-up by another prosecution witness. Ten days after the arrest, and not before he had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery. The jury found him guilty and he was sentenced to twenty years in prison. In brief, his appeals were disposed of on the grounds of harmless error.

On these basic facts (which will be elaborated on hereafter) the question presented is:

> **Whether or Not the Petitioner's Detention for Ten Days, upon an Arrest Without a Warrant, and Without His Being Taken Before a Magistrate, While Incriminating Illegal Evidence Was Gathered Against Him from Repeated Line-Ups, Amounted to a Violation of the Petitioner's Rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.**

Or, stated differently:

> **Whether the Federal Constitution Requires the Exclusion of Illegally Obtained Line-Up Identification of a Suspect That Occurred When the Police Officials Failed to Take the Accused Before a Magistrate and Where the Evidence Was Gathered During an Unreasonable Delay Between the Suspect's Arrest and Arraignment.**

STATEMENT OF THE CASE

Arrest, Line-Ups and Arraignment

On February 6, 1965, at about 7:30 in the morning (R 14-16; 66-67), a U-Totem of Miami, Inc.[2] was subjected to an armed robbery (A 1).

About a month later, on March 1, 1965, the Petitioner was arrested at his home at about 1:30 in the morning without a warrant (A 28). Petitioner was not taken before a magistrate (A 28), but was incarcerated in the Dade County jail. The next day, March 2, 1965, at 2:30 in the morning, he was identified in a line-up at the jail by a prosecuting witness, Loy Diehl (A 24). Another line-up was held on March 8, 1965, at which time the Petitioner was identified by another prosecuting witness, Ronald Diehl, the young son of the first prosecution witness (A 24).

Ten days after the arrest, and not until Petitioner had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery (A 1, 34).

At the trial the case for the prosecution essentially consisted of the testimony of Loy Diehl (the operator of the store that was robbed) and his son, Ronald, and their identification of the Petitioner, as well as the testimony of the law enforcement officer who had ordered the Petitioner's arrest and had conducted the line-ups (A 12-29; 32). All of the illegal incriminating evidence was, therefore, obtained during the period of Petitioner's unlawful detention.

As for the repeated line-ups, as previously noted, one of them took place at 2:30 in the morning (A 24) and the record is silent as to the time of the other line-ups.

---

2. This is a unit of a small chain grocery store.

The record also reflects that the robber had been described initially to the police as a small individual, about 5 feet 6 inches, weighing approximately 130 pounds (A 13). In at least one case there were no small people in the line-up except the Petitioner (A 22) and the prosecuting witness (Ronald Diehl) picked the smallest man in the line-up (A 21-22).

It goes without saying, and the record so reflects, that the Petitioner was without the assistance of counsel during the repeated line-ups and the only person present, other than the prosecuting witness, was Detective Kahn (A 21).

It is also apparent from the record that the father and son gave their stories to the police officer together (A 19) and that both prosecuting witnesses had only a very brief time within which to observe the alleged robber (A 16; R 26).

Trial and Conviction

Despite the continued objections and protestations of Petitioner's trial counsel (A 4-5; 6-7; 8-9; 10-11; 30), the illegally obtained line-up evidence was used against the Petitioner and such illegal and incriminating evidence constituted the only evidence against the Petitioner. As a result thereof Petitioner was found guilty by a judge and jury in the Criminal Court of Record in and for Dade County, Florida, and was sentenced to 20 years in prison (A 31).

The Decision of the District Court of Appeal of Florida, Third District

On August 9, 1966, the District Court of Appeal of Florida, Third District, rendered its opinion (A 31-33).

The Court's opinion clearly recognizes that the action taken by the police officials against the Petitioner was wrong. However, with all due deference and without attempting to be facetious, the District Court's justification for its affirmance is that it has previously affirmed convictions where the accused was not taken before a magistrate contrary to Section 901.23, *Florida Statutes*, and where illegal evidence had been thereby obtained, and, therefore, the Court saw no point in departing from its prior decisions which it cites (A 33).

However, with perhaps a twinge of judicial conscience, the District Court of Appeal of Florida, Third District, as authorized by Article V, Section 4(2) of the *Constitution of Florida*, certified the case to the Supreme Court of Florida on the ground that the decision passed upon a question of great public interest because "it concerns a determination of when the denial of a preliminary hearing in violation of Section 901.23, Florida Statutes, is prejudicial to a defendant."

The Decision of the Supreme Court of Florida

The decision of the Supreme Court of Florida again reviews the unlawful sequence of events incident to Petitioner's arrest, line-ups and arraignment, and it also appears to find (A 34-37) that what transpired was wrong but it concludes that such wrongs to Petitioner did not constitute harmful or prejudicial error; notwithstanding the fact that the *only* evidence used against the Petitioner at the trial was the illegally obtained line-up evidence which was procured between the time of Petitioner's arrest without a warrant and his arraignment some 10 days later. Petitioner shall have more to say about the concept of prejudicial error in the course of his argument, post.

SUMMARY OF ARGUMENT

The Petitioner was arrested approximately a month after an alleged armed robbery and was taken from his home without a warrant by police officers at about 1:30 in the morning. He was not taken before a committing magistrate, but was incarcerated in the Dade County jail. In fact, the Petitioner was *never* taken before a committing magistrate. For 10 days he was subjected to repeated line-ups without the aid of counsel; one of which took place at 2:30 in the morning. After the illegal and incriminating line-up evidence had been obtained, but not until the Petitioner had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery. The only incriminating evidence used at the trial was that obtained during Petitioner's unlawful detention.

On these uncontroverted facts, it is Petitioner's first contention that the *McNabb-Mallory Rule* presently applicable to federal courts should be applied as a constitutional mandate to state court proceedings. As this Court knows, this rule, in effect, provides that evidence obtained while a defendant is unlawfully detained, in violation of Rule 5(a) of the *Federal Rules of Criminal Procedure,* requiring that a person under arrest be taken to a committing magistrate without unnecessary delay, is not admissible and a conviction based on such evidence cannot be sustained.

The public policy behind this rule in federal courts is equally applicable to state court proceedings. Most of the states (including Florida) have a statutory provision similar to Rule 5(a) but, as is apparent in this case, the rule is not always enforced with vigor. The fact that most of the states have such legislation clearly evidences

the extent to which this policy is ingrained in our concepts of due process of law.

This Court has in recent times made it clear that the due process provisions of the Federal Constitution require that a state afford a defendant due process of law, not only during the period of his formal trial but throughout the entire accusatory period commencing with his arrest. The rationale of these decisions would seem to indicate that due process should also include, as a constitutional requirement, that an accused be taken before a magistrate within a reasonable period of time after his arrest.

Moreover, the unlawful detention of the Petitioner, contrary to the assertion of the Florida Supreme Court, was highly prejudicial. This is so because all of the incriminating evidence against the Petitioner was gathered during his unlawful detention. Therefore, if Petitioner had been timely taken before a magistrate, the magistrate would have had no alternative but to discharge him for lack of probable cause.

The repeated line-ups in this cause were held without the accused having the assistance of counsel. They are, therefore, illegal under the decisions of this Court. While the decisions of this Court are not retrospective with regard to illegal line-ups, nevertheless such line-ups add to the totality of circumstances involved in this proceeding.

Petitioner's final contention in this cause is that under the decisions of this Court the totality of circumstances in this cause requires a reversal under the mandate of the Fourteenth Amendment to the *Constitution of the United States*. A mere statement of the pertinent

facts would seem to call for relief. The circumstances of this case reveal a monstrous affront to the fundamental dignities of mankind and this conviction cannot stand.

ARGUMENT

As previously noted, the Petitioner was arrested and was taken from his home without a warrant by police officers at about 1:30 in the morning. He was not taken before a committing magistrate, but was incarcerated in the Dade County jail. For 10 days he was subjected to repeated line-ups without the aid of counsel. After the illegal and incriminating line-up evidence had been obtained, but not until Petitioner had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery.

The Petitioner was never taken before a committing magistrate (A 31).

The McNabb-Mallory Rule Presently Applicable to Federal Courts Should Be Applied to State Court Proceedings As a Constitutional Mandate

The so-called *McNabb-Mallory Rule* stems from the decisions of this Court in *McNabb* v. *United States of America*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, and *Mallory* v. *United States of America*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479. This rule, in effect, provides that evidence obtained while a defendant is unlawfully detained, in violation of Rule 5(a) of the *Federal Rules of Criminal Procedure*, requiring that a person under arrest be taken to a committing magistrate without unnecessary delay, is not admissible and a conviction based on such evidence cannot be sustained. See *United States* v. *Klapholz*, 2d Cir., 230 F.2d 494, cert. denied, 351 U.S. 924.

Similar provisions, in the form of legislation, requiring that arrested persons be promptly taken before a committing authority appears on the statute books of nearly all of the states, including Florida.[3]

Although the *McNabb-Mallory Rule* has heretofore been expressly applied only to proceedings in federal courts, it has been predicted that such a rule might some day apply to state court proceedings. In fact, such a prediction was made by the Supreme Court of Florida, in *Milton* v. *Cochran*, Fla., 147 So.2d 137, at 141, wherein it is stated:

---

3. Alabama—Code, 1940, Title 15, § 160; Alaska—Stat., 1963, § 12.25.150; Arizona—Code, 1939, §§ 44-107, 44-140, 44-141; Arkansas—Digest of Statutes, 1937, §§ 3729, 3731; California—Penal Code, 1941, §§ 821-29, 847-49; Colorado—Statutes, 1935, c 48, § 428; Connecticut—Gen. Stat., 1930, § 239; Delaware—Rev. Code, 1935, §§ 4456, 5173; District of Columbia—Code, 1940, §§ 4-140, 23-301; Florida—Statutes, 1941, §§ 901.06, 901.23; Georgia—Code, 1933, §§ 27-210, 27-212; Hawaii—Rev. Stat. of Hawaii, 1955, § 255-9; Idaho—Code, 1932, §§ 19-515, 19-518, 19-614, 19-615; Illinois—Rev. Stat., 1941, c 38, §§ 655, 660; Indiana—Baldwin's Stat. Anno., 1934, § 11,484; Iowa—Code, 1939, §§ 13,478, 13,481, 13,486, 13,488; Kansas—Gen. Stat., 1935, § 62-610; Kentucky—Code, 1938, §§ 45-46; Louisiana—Code of Criminal Procedure, 1932, §§ 66, 79, 80; Maine—Rev. Stat., 1930, c 145, § 9; Massachusetts—Gen. Laws, 1932, c 276, §§ 22, 29, 34; Michigan—Stat. Anno., 1938, §§ 28.863, 28.872, 28.873, 28.885; Minnesota—Mason's Stat., 1927, c 104, §§ 10,575, 10,581; Mississippi—Code, 1930, c 21, § 1230; Missouri—Rev. Stat., 1939, §§ 3862, 3883; Montana—Rev. Code, 1935, §§ 11,731, 11,739-40; Nebraska—Comp. Stat., 1929, § 29-412; Nevada—Comp. Laws, 1929, §§ 10,744-48, 10,762-64; New Hampshire—Pub. Laws, 1926, c 364, § 13; New Jersey—Rev. Stat., 1937, § 2:216-9; New York—Code of Criminal Procedure, 1939, §§ 158-59, 165, 185; North Carolina—Code, 1939, §§ 4528, 4548; North Dakota—Comp. Laws, 1913, §§ 10,543, 10,548, 10,576, 10,578; Ohio—Throckmorton's Code, 1940, §§ 13,432-3, 13,432-4; Oklahoma—Statutes, 1941, Title 22, §§ 176-77, 181, 205; Oregon—Code, 1930, §§ 13-2117, 13-2201; Pennsylvania—Purdon's Stat. Anno. Perm. ed Title 19, §§ 3, 4; Rhode Island—Gen. Laws, 1938, c 625, § 68; South Carolina—Code, 1942, §§ 907, 920; South Dakota—Code, 1939, §§ 34.1608, 34.1619-24; Tennessee—Michie's Code, 1938, §§ 11,515, 11,544; Texas—Code of Criminal Procedure, 1936, Arts. 233-35; Utah—Rev. Stat., 1933, §§ 105-4-4, 105-4-5, 103-26-51; Virginia—Code, 1942, §§ 4826, 4827a; Washington—Rev. Stat., 1932, § 1949; West Virginia—Code, 1937, § 6150; Wisconsin—Statutes, 1941, § 361.08; Wyoming—Rev. Stat., 1931, §§ 33-108, 33-110, 33-115.

> "We would be derelict in our duty if we did not here point out that continued violation of these statutes are certain to result in the McNabb rule, or some version thereof, being adopted by this State or being imposed on our state courts by decisions of federal courts. Recent history promises this as an event reasonably to be expected."

It is respectfully submitted that the time has come to make a prophet out of the Supreme Court of Florida and make the *McNabb-Mallory Rule* applicable to state court proceedings[4] as a constitutional requirement.

In the first place, it should be noted that this Court in both the *McNabb* and *Mallory* cases, *supra*, did not reject the concept of this rule being a constitutional mandate. The Court in both decisions expressly refused to pass upon the constitutional question at that time. In the *McNabb* case, for example, the Court states, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, at 824:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us."

---

4. Some states have voluntarily applied the rule to their statutes. Michigan and Delaware have expressly overturned convictions where the accused was held for an unreasonable period of time prior to being taken before a magistrate. See *People* v. *Hamilton*, 359 Mich. 410, 102 N.W.2d 738, and *Vorhauer* v. *Delaware*, Del., 212 A.2d 886. But some states, in addition to Florida, refuse to honor their own statutory requirements. See, e.g.: Arizona—*State* v. *Hudson*, 89 Ariz. 103, 358 P.2d 332; Mississippi—*Parker* v. *State*, Miss., 141 So.2d 546; New Jersey—*State* v. *Hodgson*, 44 N.J. 151, 207 A.2d 542; Hawaii—*State* v. *Evans*, Haw., 372 P.2d 365; Illinois—*People* v. *Novak*, 33 Ill.2d 343, 211 N.E.2d 235; Iowa—*State* v. *Hodge*, 252 Ia. 449, 105 N.W.2d 613; Montana—*State* v. *Nelson*, Mont., 362 P.2d 237; Nebraska—*Gallegos* v. *Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86; Washington—*State* v. *Hoffman*, Wash., 392 P.2d 237.

It is respectfully submitted that the time is nigh to decide[5] this constitutional issue with respect to state court proceedings.

In the *McNabb* case, *supra*, Mr. Justice Frankfurter states in clear and unequivocal language the public policy and purpose behind the *McNabb Rule* (87 L.Ed., at 825):

> "The purpose of this impressively persuasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.'"

---

5. On November 26, 1951, this Court decided the case of *Gallegos* v. *Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86, in which this question was apparently involved. However, it does not appear that any one of the reported opinions constitutes a decision of this Court since the Court could not agree upon an opinion. It is also suggested that very little vitality remains in the *Gallegos* case, *supra*, as a precedent, in view of this Court's more recent decisions in *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 977; and *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. At least one commentator believes that this Court now rests the McNabb-Mallory Rule on constitutional grounds, and that the rule applies to the states as well through the Due Process Clause. See Broeder, *Wong Sun—A Study in Faith and Hope*, 42 Neb.L.Rev. 483, at 564, et seq.

This policy pronouncement is equally applicable to state court proceedings.

The purpose of the preliminary hearing is, of course, to weed out groundless or unsupported charges of grave offenses, and to relieve the accused the degradation and expense of a criminal trial. A quick determination of probable cause is a necessity in any scheme of due process of law.

Although resolution of the probable cause issue is the main objective of the hearing, it is apparent that it has many other functions: For example, it affords the accused the opportunity to have bail set, which is a constitutional right, and it affords him the opportunity of obtaining counsel which is also a constitutional right. It also is a deterrent to unlawful custodial interrogation, unlawful line-ups without counsel and other police harassment.

The fact that so many of our states[6] have enacted legislation requiring an accused to be promptly taken before a magistrate without unnecessary delay clearly evidences the extent to which this policy is ingrained in our concepts of due process of law.

It would seem clear that the due process provisions of the Federal Constitution require that a state afford a defendant due process of law not only during the period of his formal trial but throughout the entire accusatory period commencing with his arrest. See *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 977; *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; and *Gilbert* v. *California*, 388 U.S. 263, 87

6. See footnote 3.

S.Ct. 1951, 18 L.Ed.2d 1178. Hence, due process should include the constitutional requirement that an accused be taken before a magistrate within a reasonable period of time after his arrest.

The constitutional requirement that Petitioner, under the circumstances of this case, should have been taken before a magistrate by the police officers, is neither new nor novel. For example, this Court has, on constitutional grounds, set aside convictions in state courts of persons "who have been unlawfully held incommunicado without advice of friends or counsel," *Ward* v. *Texas,* 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663, 1667; and see *Brown* v. *Mississippi,* 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *Chambers* v. *Florida,* 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; *Canty* v. *Alabama,* 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988; *White* v. *Texas,* 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342; *Lomax* v. *Texas,* 313 U.S. 544, 61 S.Ct. 956, 85 L.Ed. 1511; and *Vernon* v. *Alabama,* 313 U.S. 547, 61 S.Ct. 1092, 85 L.Ed. 1513.

In fact, the case of *Watts* v. *Indiana,* 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, comes very close to being on point. Although this Court did not expressly, in that case, apply the *McNabb-Mallory Rule,* it did reverse a state court conviction on constitutional grounds where the accused was not promptly given a preliminary hearing before a magistrate as required by the law of Indiana. In that case, this Court noted (93 L.Ed., at 1806-1807):

> "Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the petitioner was not only given no hearing during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights."
>
> * * *

> "The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, *the right to a prompt hearing before a magistrate,* the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands."
>
> * * *
>
> "In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken."

The observation of Mr. Justice Douglas in his concurring opinion to the *Watts* decision is also pertinent (93 L.Ed., at 1808):

> "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate."

The right of an individual to be protected against unlawful infringement by governmental officials should be preserved. As Mr. Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipres-

> ent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States,* 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944, 959 (dissenting opinion).

It will probably be urged that the application of the *McNabb-Mallory Rule* to state court proceedings will hamper effective law enforcement. Nothing could be further from the truth. As this Court knows, the Federal *Bureau of Investigation* has been required to live with Rule 5(a) of the *Federal Rules of Criminal Procedure* and the *McNabb-Mallory Rule* for many, many years and it is still recognized as one of the top law enforcement agencies in the nation, if not the world.

The Illegal Line-Ups

The repeated line-ups of the Petitioner in this cause, even if they had not been conducted when he was unlawfully detained, were illegal in and of themselves inasmuch as Petitioner did not have counsel present at the time. *United States* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; *Gilbert* v. *California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178. Of course, while it is true that these illegal line-ups cannot be a basis of a reversal in and of themselves, *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, the fact remains that such line-ups, in the circumstances of this case, are nonetheless illegal.

The language of this Court in the *Wade* case, *supra,* is singularly applicable to the case at bar (18 L.Ed.2d, at 1158-1159):

"But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

* * *

"And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

"Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'"

In the instant case the Court will recall, as reflected by the record, that the robber was initially described as a small person, about 5 feet 6 inches tall, weighing approximately 130 pounds (A 13), and the police employed a line-up in which the Petitioner was the *only* small person

present (A 22) and the prosecuting witness picked the smallest man in the line-up (A 21-22).

Prejudicial Error

The only fair analysis of the decision of the Supreme Court of Florida is that that Court found that the unlawful circumstances and events were harmless error (A 34-37). This conclusion of the learned Florida Court is difficult to follow.

It is to be recalled that the only evidence used against the Petitioner at the trial was the evidence resulting from the illegal line-ups. If the Petitioner had been promptly taken before a magistrate as required by Section 901.23, *Florida Statutes*, such evidence would not have been available to the prosecution as it was not yet in being. Since we must assume that the magistrate would do his duty, it must necessarily follow that Petitioner would have been released for lack of probable cause had he been afforded his right of being taken before a magistrate as required by the statute. The State's failure to do this would seem to constitute prejudicial error of the worst kind.

As this Court stated in *Mallory* v. *United States of America*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479, at 1484:

> "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'"

The above quote is particularly applicable to the case at bar.

The Supreme Court of Florida also finds comfort (A 36) from the fact, which it quotes with emphasis, that the Petitioner did not ask to be taken before a magistrate. It is respectfully submitted that the Court's confident re-

liance on the above assertion is misplaced. A statement made by this Court in *Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70, at 77, is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

The rationale of this Court's holding in the *Carnley* case would seem to apply to the charge that the Petitioner did not request to be taken before a magistrate. The record on this point is silent. Also in the *Carnley* case, *supra*, (8 L.Ed.2d 70, at 76), this Court stated:

> "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."

This proposition would seem to apply with equal force in the context of requiring an accused to be taken before a magistrate.

Moreover, this Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, that there must be a clear, intelligent waiver of one's constitutional rights, would seem to dispose of the Supreme Court of Florida's contention that the Petitioner should have asked to be taken before a magistrate.

The record in this cause is also silent with regard to custodial interrogation, although it is clear that Petitioner never confessed. It would seem to be a reasonable presumption from a recognition of police practices[7] that Petitioner was constantly and continuously grilled during the 10-day period that he was unlawfully detained.[8]

---

7. See the discussion of such practices in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

8. Petitioner has advised counsel that this was definitely true although in fairness to the State it is not a part of the record.

The Totality of Circumstances in This Cause Requires a Reversal under the Mandate of the Fourteenth Amendment to the Constitution of the United States

Even if this Court, in its wisdom, decides against the application of the *McNabb-Mallory Rule* to state court proceedings as a constitutional mandate, it is respectfully submitted that the totality of circumstances in the instant case requires a reversal under the mandate of the Fourteenth Amendment to the *Constitution of the United States.* See *Stovall* v. *Denno*, 388 U.S. 293, 301, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1206.

The concept of applying the Fourteenth Amendment to a state court proceeding is well stated in the case of *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, at 188:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, supra (342 US at 416, 417, 89 L ed 1039, 65 S Ct 781). These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 US 97, 105, 78 L ed 674, 677, 54 S Ct 330, 90 ALR 575, or are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 US 319, 325, 82 L ed 288, 292, 58 S Ct 149."

And, again, at 96 L.Ed., p. 190:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' See Mr. Chief Justice Hughes, speaking for a unanimous Court in Brown v. Mississippi, 297 US 278, 285, 286, 80 L ed 682, 686, 687, 56 S Ct 461."

Mr. Justice Douglas' observation in his concurring opinion in the *Rochin* case, *supra,* with respect to the Fifth Amendment to the Constitution, is suggested as applicable here (96 L.Ed., at 193):

> "If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse."

The totality of circumstances in the instant case reflects that approximately a month after an alleged crime, the Petitioner was snatched from his home without a warrant, placed under arrest and incarcerated in the Dade County jail, and was never taken before a magistrate. He was held for some 10 days prior to being arraigned and during the period of his unlawful detention he was forced to appear in repeated illegal line-ups, at which incriminating evidence was gathered and only after the incriminating evidence was gathered and only after a Petition for Writ of Habeas Corpus had been filed was he arraigned. The line-up itself was of dubious reliability and the only evidence used against him in the trial was this illegal and incriminating evidence obtained during the unlawful detention.

A mere statement of the pertinent facts would seem to call for relief. As this Court observed in *McNabb* v. *United*

States of America, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, at 827:

> ". . . a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here."

CONCLUSION

The circumstances of this case reveal a monstrous affront to the fundamental dignities of mankind. This conviction cannot stand.

Respectfully submitted,

PHILLIP GOLDMAN
14th Floor First National Bank Building
Miami, Florida 33131
Counsel for Petitioner

APPENDIX

APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V

"No person . . . shall be compelled in any criminal case to be a witness against himself."

United States Constitution, Amendment VI

"In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense."

United States Constitution, Amendment XIV

§1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Florida Statute in Effect at All Times Material to This Proceeding

Sec. 901.23 (2 Fla.Stat. 1957, p. 3850)

Duty of officer after arrest without warrant.—An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest and most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest and most accessible magistrate in the same county.

BRARY
E COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 2[illegible] 1968
[illegible] CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,

Petitioner,

vs.

FLORIDA,

Respondent,

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH
Attorney General
State of Florida
EDWARD COWART
Assistant Attorney General
State of Florida

HAROLD MENDELOW
Assistant Attorney General
State of Florida
Counsel for Respondent
State Office Building
1350 N. W. 12th Avenue
Miami, Florida 33136

INDEX

Subject Index

	Page
Brief for the Respondent	1
Preliminary Statement	1
Question Presented	1
Statement	2
Summary of Argument	4
Argument	5
The McNabb-Mallory Rule Applies Only to Confessions	5
The McNabb-Mallory Rule is not Binding Upon the States	9
The Petitioner was not Deprived of Any Fifth or Sixth Amendment Rights by the Failure of the Arresting Officers to Bring Him Before a Committing Magistrate	10
The Totality of the Circumstances With Regard to the Lineups was not shown to be Fundamentally Unfair, and Thus, was not Violative of the "Due Process Clause."	14
Conclusion	15
Appendix—Statutory Provisions Involved	A1

AUTHORITIES CITED

CASES

Case	Page
Adams v. United States, ... F.2d ....., 3 Cr.L. 2305 (D.C. Cir. 1968)	7
Ashcraft v. Tennessee, 322 U.S. 143 (1944)	9
Baugus v. State, 141 So. 2d 264 (Fla. 1962)	13
Beck v. Washington, 369 U.S. 541 (1962)	12
Brown v. Allen, 344 U.S. 443 (1953)	9
Bynam v. United States, 262 F.2d 465 (D.C. Cir. 1958)	7
Cleary v. Bolger, 371 U.S. 392 (1964)	8
Culombe v. Connecticut, 367 U.S. 568 (1961)	9, 12
Escobedo v. Illinois, 378 U.S. 478 (1964)	9
Gallegos v. Nebraska, 342 U.S. 55 (1951)	9
Gilbert v. California, 388 U.S. 263 (1967)	7, 9
McNabb v. United States, 318 U.S. 332 (1943)	4, 6
Mallory v. United States, 354 U.S. 449 (1957)	4, 6, 10
Mapp v. Ohio, 367 U.S. 643 (1961)	8
Massiah v. United States, 377 U.S. 201 (1964)	9
Miranda v. Arizona, 384 U.S. 436 (1966)	6, 8, 9
Palmieri v. State, 189 So.2d 512 (3rd D.C.A. Fla. 1966)	2

AUTHORITIES CITED (Cont'd)

Page

Schmerber v. California, 384 U.S. 757 (1965) 11

Simmons v. United States, ... U.S. ....., ... S.Ct. ....., 19 L.Ed.2d 1247 (1968) 5, 9, 13, 14

Stein v. New York, 346 U.S. 156 (1953) 9

Stovall v. Denno, 388 U.S. 293 (1967) 7, 9, 12

Townsend v. Burke, 344 U.S. 736 (1948) 9

United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956) 8

United States v. Wade, 388 U.S. 218 (1967) 8, 9, 11, 12

Wong Sun v. United States, 371 U.S. 471 (1963) 7

STATUTES

Section 901.23, Florida Statutes, (1967) 10, 11, 12, 13

OTHER AUTHORITIES

Constitutional Provisions:

United States Constitution:

Fifth Amendment 4, 7, 11, 13

Sixth Amendment 4, 5, 7, 11, 13

Fourteenth Amendment 4, 7, 11

Title 18 U.S.C. Section 3501 (b)(c) 8

Federal Rules of Criminal Procedure, Rule 5(a) 6, 8, 11, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,

Petitioner,

vs.

FLORIDA,

Respondent,

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

In this brief the symbol "A" will indicate references to the printed appendix. All emphasis is supplied unless the contrary is indicated.

QUESTION PRESENTED

Based upon the facts as reflected in the printed Appendix, the respondent respectfully rephrases the petitioner's questions and asserts that the following question is determinative of the issues involved herein.

WHETHER FAILURE TO IMMEDIATELY TAKE A PERSON ARRESTED UPON PROBABLE CAUSE BEFORE A MAGISTRATE BARS, UNDER THE FEDERAL CONSTITUTION, IN A STATE PROSECUTION, LINEUP IDENTIFICATION EVIDENCE SECURED DURING DETENTION?

STATEMENT

On March 1, 1965, the petitioner was arrested and detained in the Dade County Jail for armed robbery (A. 28). On March 10, 1965, petitioner was formally charged with armed robbery by an information after he had filed a petition for writ of habeas corpus (A. 1). He was arraigned and pled not guilty on March 16, 1965 (A. 2). A jury trial was had on September 22-23, 1965. At the close of all evidence the petitioner moved for a directed verdict which was denied. Following the verdict of guilty, the petitioner filed a motion for new trial which was also denied (A. 30). The petitioner was sentenced to twenty (20) years at hard labor in the state penitentiary.

He appealed his cause to the Third District Court of Appeal (A. 31). *Palmieri v. State*, 189 So.2d 512 (3rd D.C.A. Fla. 1966). Therein the court affirmed the conviction below (A. 33). However, the question of whether the petitioner's detention was prejudicial was certified to the Florida Supreme Court as a "question of great public interest". The Florida Supreme Court affirmed the judgment of the district court based upon the finding that (1) the petitioner was not *prejudiced* by his detention, (2) no coerced confession was involved, and (3) the McNabb-

Mallory holding was as yet inapplicable to the states (A. 36-37). Petitioner takes this last basis for presenting a federal question to be determined by the United States Supreme Court on certiorari. Asking that the McNabb-Mallory Rule be extended to the States, and expanded to include *all* evidence obtained during pre-magistrate detention—not just coerced confessions—petitioner takes his cause to this Court.

On February 6, 1965, a U-Tote'm of Miami, Inc., grocery store was robbed. The entire robbery took about five minutes (A. 17), during which time the assailant took the store's bank bag filled with monies, and cleaned out the cash register. A total of $135.26 was stolen. The proprietor, Loy Diehl, had received extensive training in identifying individuals as an MP with the Marine Corps (A. 13). Consequently, he was able to describe the sequence of events *and the robber* to a high degree of particularity (A. 12-13).

Immediately following the robbery, the manager reported the incident to the Dade County Sheriff's Department (A. 14). Several days later Detective Kahn, a Sheriff's Deputy, brought over a half dozen photographs to the store; the petitioner was identified at that time from one of these photographs by Loy Diehl (A. 15).

The petitioner was subsequently arrested on March 1, 1965. He was placed in a six-man lineup at about 2:30 A. M., March 2, 1965, and was once more identified by the victim Loy Diehl (A. 15-16). On March 8, 1965, six days later, the petitioner was again placed in a lineup and identified by Ronald Diehl, the victim's son who was also present during the robbery (A. 19-22). This witness was not coached in any way by Detective Kahn (A. 18). The record reveals that the younger Diehl had ample time to view the

robber (A. 16) and was able to make a positive in-court identification based on what he saw at the time of the crime.

Ten days after the arrest following these two lineups and the filing of a petition for writ of habeas corpus, the petitioner was formally charged by information with armed robbery. During this ten-day period, the petitioner was in custody in the Dade County Jail. However, no interrogation of any kind nor any coerced confession resulting from this detention appears anywhere in the record. Furthermore, the record reflects extensive testimony to the effect that both the victim and the witness identified the petitioner in court based upon the *incident* rather than the lineups.

SUMMARY OF ARGUMENT

Rule 5(a) of the Federal Rules of Criminal Procedure as effectuated by *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), does not apply to cases wherein evidence other than confessions or admissions is secured as a result of failure to present an accused before a committing magistrate after arrest. In cases where the detention has produced other evidence, the Court has clearly based its decision on constitutional grounds. The purpose of the McNabb-Mallory Rule has been fulfilled by recent decisions of this Court which afford an accused the protection of the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution.

The McNabb-Mallory Rule is not binding upon the States. The statutory rights encompassed by the rule have been provided to state prisoners by the decisions of this Court.

The petitioner was not prejudiced nor deprived of any constitutional rights because he was not brought before a committing magistrate subsequent to arrest. He was lawfully arrested upon probable cause. The detention period was not a ruse to establish probable cause for the arrest. The detention did not result in a confession or admission. He was not deprived of any Sixth Amendment right because the identification confrontation occurred prior to June 12, 1967. The in-court identification was not based upon or connected with any lineup confrontation. The petitioner has failed to demonstrate any causal connection between the failure to present him before a committing magistrate and his prosecution or conviction.

The conduct of the lineups was not fundamentally unfair as far as being untrustworthy or suggestive. The procedure used was similar to the procedure approved in *Simmons v. United States*, ____ U.S. ____, ____ S. Ct. ____, 19 L.Ed.2d 1247 (1968).

ARGUMENT

THE MCNABB-MALLORY RULE APPLIES ONLY TO CONFESSIONS.

The detention of the petitioner occurred after he was lawfully arrested for the crime of robbery. The morning after his arrest he was placed in a six-man lineup and identified by the victim of the robbery. Six days later, he was again placed in a lineup and identified by a witness to the robbery. Thus, the record reveals that the petitioner participated in *two* lineups directly connected with the crime of which he was convicted. The petitioner was not interrogated nor was any inculpatory statement or confession used against him at trial.

The detention of persons accused of crime has been the subject matter of great concern of this Court as well

as of Congress, the State courts, and the State legislatures. In federal prosecutions, this Court has repeatedly relied upon its supervisory powers over federal criminal procedure and its interpretation of Rule 5(a) of the Federal Rules of Criminal Procedure as effectuated by *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), in eradicating the "evil implications of *secret interrogations* of persons accused of crime". *Mallory*, supra at 453. Although the Court has consistently failed to reach the constitutional considerations of the McNabb-Mallory Rule, it has made it clear that its genesis is laid in the Fifth Amendment privilege against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436, 463 (1966) it is stated:

> "Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. *These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States.* In *McNabb*, 318 U.S., at 343-344, and in *Mallory*, 354 U.S. at 455-456, *we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.*"

In order to insure that the accused is afforded the privilege in those cases where there is an arrest without a warrant, he is to have a magistrate inform him of the charges placed against him, of his right to retain counsel, and of his right to a preliminary examination. In addition, the magistrate should inform the accused that he is not required to make a statement and that any statement may be used against him. Further, the magistrate shall allow the accused reasonable time and opportunity to consult counsel and shall admit the accused to bail.

While it is conceivable that the "rule" could be extended to situations whereby the evidence secured during detention is other than a confession or admission, this Court has consistently limited its interpretation of the "rule" to confession cases arising out of federal prosecution. In cases where the detention produced other evidence, the Court has clearly based its decisions on constitutional grounds. For example, in both federal and state cases where the detention was a result of an illegal arrest, all evidence secured during the detention is excludable under the due process clause. *Wong Sun v. United States*, 371 U.S. 471 (1963). See *Adams v. United States*, ____ F.2d ____, 3 Cr.L.2305 (D.C. Cir. 1968); *Bynam v. United States*, 262 F.2d 465 (D.C. Cir. 1958).

In addition, where the detention produces identification evidence in violation of the Sixth Amendment or the due process clauses of the Fifth or Fourteenth Amendments, the evidence produced is inadmissible. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

In fact, even in confession cases, where the confession is secured as a result of custodial interrogation, i.e., detention, any violation of the Fifth or Sixth Amendments renders the confession inadmissible. *Miranda v. Arizona*, supra. Finally, in those cases where evidence is secured as a result of any unlawful search and seizure while the accused is detained, such evidence is inadmissible. *Mapp v. Ohio*, 367 U.S. 643 (1961). Therefore, it is indeed unnecessary to protect an accused by means of an extension of the McNabb-Mallory Rule in cases where the evidence secured as a result of detention is other than a confession or admission. It is clear that many of the safeguards afforded a defendant by being brought before a magistrate have been fulfilled by recent decisions of this Court. *Miranda v. Arizona*, supra; *United States v. Wade*, supra; *Gilbert v. California*, supra.

It should be noted that Congress in Title 18 U.S.C. § 3501 (b) (c), also known as the "Omnibus Crime Control and Safe Streets Act of 1968," has rejected the McNabb-Mallory Rule as the sole factor in determining whether a confession is admissible *vel non*.

The petitioner cites *United States v. Klapholz*, 230 F.2d 494 (2d Cir. 1956) for the proposition that any evidence secured by federal agents in violation of Rule 5(a) should be suppressed. It is submitted that this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) decided subsequent to that case, would require a reversal on constitutional grounds and not on a constrained interpretation of the federal rules. See *Cleary v. Bolger*, 371 U.S. 392 (1964).

THE MCNABB-MALLORY RULE IS NOT BINDING UPON THE STATES.

In reviewing state court convictions in which the issue has been the detention of the accused, this Court has never relied upon its supervisory powers of the administration of federal criminal procedure and has stated many times that the McNabb-Mallory Rule is not binding upon the states. *Miranda v. Arizona*, supra; *Stein v. New York*, 346 U.S. 156, 157 (1953); *Gallegos v. Nebraska*, 342 U.S. 55, 63-65, 73 (1951); *Brown v. Allen*, 344 U.S. 443, 476 (1953); *Townsend v. Burke*, 344 U.S. 736, 738 (1948) (dictum). See also *Culombe v. Connecticut*, 367 U.S. 568, 600-601 (1961). However, the Court has more than filled the breach by ruling that prolonged detention in confession cases may be inherently coercive. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Further, in order to deter official lawlessness, the Court has established the right to counsel at the pre-arraignment stage. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

Further, the due process clause of the Fourteenth Amendment has always been utilized to prevent the fruits of official lawlessness at the pre-trial stage from being used at trial. *Stovall v. Denno*, supra; *Simmons v. United States*, supra. Hence, the statutory rights provided for an accused by the McNabb-Mallory Rule in federal prosecutions have been afforded to state prisoners by the decisions of this Court. The need for binding the states by the McNabb-Mallory Rule has clearly been obviated.

THE PETITIONER WAS NOT DEPRIVED OF ANY FIFTH OR SIXTH AMENDMENT RIGHTS BY THE FAILURE OF THE ARRESTING OFFICERS TO BRING HIM BEFORE A COMMITTING MAGISTRATE.

The petitioner contends that the failure of the arresting officers to bring him before a committing magistrate without unnecessary delay in violation of § 901.23 Fla. Stat. (1967) resulted in irreparable prejudice to his cause.

It is submitted that the mere failure to take one lawfully arrested before a committing magistrate or mere detention after a lawful arrest on a bailable offense does not prejudice the accused. It is only the events and activities that occurred after the lawful arrest and before the preliminary hearing or arraignment that could possibly prejudice a defendant. If the period of detention is used to gather evidence to establish probable cause for the arrest, the accused's constitutional rights have been violated. However, *this is not true in the case at bar.*

The record herein clearly establishes that the instant arrest was based upon probable cause. The victim of and the witness to the robbery clearly described the physical characteristics of the petitioner to the police on the day of the robbery. Further, the victim picked out the petitioner's picture prior to arrest. It is clear that the petitioner does not attack the arrest as being unlawful nor was the petitioner's detention a result of any primary illegality. Thus, the detention in the instant cause was not a ruse to establish probable cause for the arrest. *Mallory v. United States*, supra.

Further, § 901.23 Fla. Stat. (1967) tracks the language of Rule 5(a) of the Federal Rules of Criminal Procedure, and like its federal counterpart, it was designed to prevent the evils arising out of secret interrogation. Therefore, if the failure to take petitioner before a committing magistrate resulted in a deprivation of his rights, those rights would necessarily arise out of a violation of the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to effective assistance of counsel made applicable to the states through the Fourteenth Amendment. However, in the case at bar, *the detention did not result in a confession or admission.* The *Wade* decision, supra, and *Schmerber v. California,* 384 U.S. 757 (1965), have made it clear that the Fifth Amendment privilege against self-incrimination is not violated by compelling an accused to participate in a lineup during detention. The danger of secrecy also permeates those detentions that result in lineup identifications of the accused.

> "But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontation: 'Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on. . . .' *Miranda v. Arizona,* supra, 384 U.S. at 448, 16 L.Ed.2d at 709, 10 A.L.R. 3rd 974." *Wade v. United States,* supra, 338 U.S. at 230.

Thus, the *Wade* decision afforded the accused the right of counsel at pre-arraignment confrontations. Both petitioner and respondent also agree that the petitioner's right to effective assistance of counsel was not violated in the instant cause because the lineup occurred prior to June 12,

1967. *Stovall v. Denno*, supra. Furthermore, any stigma attached to the lineups due to the fact that counsel was not present was obviated by "clear and convincing evidence that the in court identifications were based upon observations of the suspect other than the lineup identifications." *United States v. Wade*, supra, 388 U.S. at 240.

Assuming, arguendo, that the petitioner was taken before a committing magistrate prior to any lineup identification and released, it is clear, as the Florida Supreme Court's opinion points out,

> "A prosecution may be instituted and maintained regardless of whether such a hearing is or is not held and regardless of whether probable cause to hold the accused for trial is or is not found.' Montgomery v. State (Fla. 1965), 176 So.2d 331, cert. denied, 384 U.S. 1023, 86 S. Ct. 1955, 16 L.Ed. 2d 1026."

See also *Beck v. Washington*, 369 U.S. 541 (1962); *Culombe v. Connecticut*, 367 U.S. 568 (1961).

There is no doubt that there was sufficient probable cause, independent of the lineup identification, to support an arrest and formal charges by the state prosecuting officials. It is submitted that the petitioner has failed to demonstrate prejudice since there was no casual connection between the failure to be taken before a committing magistrate and the fact that he was detained for ten days and identified in two lineups since, independent of the lineup identification, there was sufficient probable cause to support a prosecution and sufficient competent evidence to support a conviction. Therefore, a technical violation of § 901.23 Fla. Stat. cannot be the basis of the petitioner's conviction.

The police could have directly instituted charges based upon the victim's identifying the petitioner's photograph prior to arrest (A. 15). See *Simmons v. United States*, ___ U.S. ___, ___ S. Ct. ___, 19 L.Ed.2d 1247 (1968).

Florida courts have consistently taken the position that a technical violation of Fla. Stat. § 901.23, absent a showing of prejudice flowing therefrom, will not compel a suppression of any evidence obtained. *Baugus v. State*, 141 So.2d 264 (Fla. 1962). This position is *in accord* with the newly-enacted federal standard contained in the Omnibus Safe Streets and Crime Control Act, supra, which alters Rule 5(a) so as to not rest the admissibility *vel non* of any evidence upon literal compliance with Rule 5(a).

The petitioner's assumption that a committing magistrate would have released him is pure speculation. It is indeed more probable that the victim of the robbery, whose accurate description of petitioner was given to the police and whose identification of petitioner's photograph actually caused petitioner's arrest, would have identified the petitioner at the hearing before a magistrate just as he did twenty-five hours after arrest, at the lineup.

Petitioner does not claim that he was not advised of the charge for which he was placed under arrest. Further, he had the advice of counsel sometime during the ten day period of detention (A. 11) as indicated by a petition for writ of habeas corpus filed in his behalf prior to formal charges. Nor does petitioner contend that bail was not available to release him upon arrest. Therefore, the fact that the petitioner was detained after a lawful arrest and participated in two lineups during detention did not prejudice him or deprive him of any of the rights enjoyed under the Fifth and Sixth Amendments.

THE TOTALITY OF THE CIRCUMSTANCES WITH REGARD TO THE LINEUPS WAS NOT SHOWN TO BE FUNDAMENTALLY UNFAIR, AND THUS WAS NOT VIOLATIVE OF THE "DUE PROCESS CLAUSE."

The petitioner was not deprived of due process of law. The first lineup was conducted twenty-five hours after the petitioner's lawful arrest. Six persons including the petitioner participated. The victim was instructed to "view the lineup, take his time, and be sure, and that if he recognized the individual who held him up, to please tell me his number" (A. 24). The victim picked out the petitioner. Six days later, the witness who had not been shown the petitioner's picture was contacted by the police to attend a lineup. He viewed a lineup which consisted of five persons. Although he picked out the smallest man in the lineup, no distinctive differences among the participants were present (A. 21-22). However, it is important to note that neither the victim nor the witness based his in-court identification upon the lineup (A. 13-14, 18-19). The actual circumstances of the lineups were similar to procedures approved and recommended by the Court in *Simmons v. United States*, supra, 19 L.Ed. 2d at 1254, footnote 6.

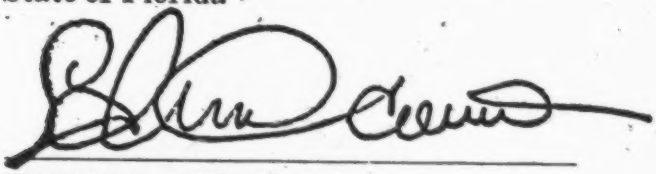
Indeed, under the factual surroundings of the instant case, it has not been demonstrated that the identification procedures were untrustworthy or suggestive in any way, manner or form.

CONCLUSION

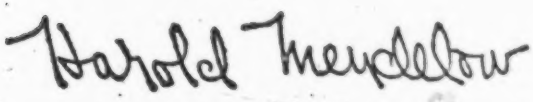
Based upon the foregoing argument and citation of authorities, the respondent urges that the petitioner's conviction be affirmed.

Respectfully submitted,

EARL FAIRCLOTH, Attorney General,
State of Florida



EDWARD COWART
Assistant Attorney General,
State of Florida.



HAROLD MENDELOW
Assistant Attorney General,
State of Florida.

APPENDIX

Statutory Provisions Involved
"Omnibus Crime Control and Safe Streets Act of 1968"

"TITLE II — ADMISSIBILITY OF CONFESSIONS, REVIEWABILITY OF ADMISSION IN EVIDENCE OF CONFESSIONS IN STATE CASES, ADMISSIBILITY IN EVIDENCE OF EYE WITNESS TESTIMONY, AND PROCEDURES IN OBTAINING WRITS OF HABEAS CORPUS

'§ 3501. Admissibility of confessions'

'(a) . . . .'

'(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.'

'The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.'

'(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.' "

SUPREME COURT OF THE UNITED STATES

No. 131--October Term, 1968

Office-Supreme Court, U.S.
FILED
DEC 13 1968
JOHN F. DAVIS, CLERK

Carmine Vincent Palmieri,)
)
Petitioner,)
)
v.)
)
State of Florida.)

PETITION FOR REHEARING

The petitioner, Carmine Vincent Palmieri, by his undersigned Court-appointed counsel, respectfully petitions this Court for a rehearing and in support thereof would show unto the Court as follows:

1. The arrest of the petitioner Palmieri which was made at his home at 1:30 in the morning without a warrant was clearly illegal. The record shows that the arrest was made approximately a month after the alleged offense and, therefore, it could not be based upon the theory that it was an arrest for an offense committed in the presence of the arresting officer. The record also shows an absence of probable cause for the making of the arrest.

2. With respect to probable cause for making the arrest, it is true, on page 15 of the record, that the prosecuting witness was shown photographs and purported to pick one person out from the photographs, but at no point in the record does it appear that the person picked out was the petitioner, Carmine Vincent Palmieri.

3. A review of the transcript of oral argument will reveal that in a colloquy with Mr. Justice Stewart, counsel for the State conceded that

the record failed to show probable cause for the arrest of the petitioner.

4. The record further shows (Appendix pp. 4-5, 6-7, 8-9) that the question of an illegal arrest was preserved at the trial court level. There is also some doubt as to whether or not it was pursued in the Florida appellate courts. However, petitioner should not be penalized by the deprivation of 20 years of his liberty as a result of the failure of his State Court counsel to pursue the illegal arrest issue. A petitioner should be allowed to raise questions of fundamental error affecting his constitutional rights at any time.

5. In this cause the record reveals that all of the evidence used against the petitioner was gathered by line-ups after the illegal arrest. It is true that the record reveals an in-court identification but this was made by the same person who had made the illegal line-up indentification and, as this Court pointed out in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, once a prosecuting witness has identified the accused in a line-up he is not likely to change his mind.

6. Evidence obtained as a result of an illegal arrest is clearly inadmissible and a conviction based thereon cannot stand. See Wong Sun v. United States, 371 U.S. 471 (1963).

WHEREFORE, this Court's order in this cause should be set aside and petitioner's conviction for armed robbery should be reversed.

Respectfully submitted,

PHILLIP GOLDMAN
14th Floor First National Bank Building
Miami, Florida 33131
Counsel for Petitioner

I certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

Phillip Goldman

Phillip Goldman

Sworn to and subscribed before me
this 11th day of December, 1968.

Clare A. Gosnell

Notary Public, State of Florida
at Large.

My commission expires:

Notary Public, State of Florida at Large
My Commission Expires Sept. 28, 1970
Bonded by Transamerica Insurance Co.

Office-Supreme Court, U.S.
FILED
DEC 13 1968
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

No. 131--October Term, 1968

Carmine Vincent Palmieri,

Petitioner,

v.

State of Florida.

On Writ of Certiorari to the Supreme Court of Florida

AMENDED PETITION FOR REHEARING

The petitioner, Carmine Vincent Palmieri, by his undersigned Court-appointed counsel, within the time allowed by the rules for the filing of a Petition for Rehearing, respectfully files this, his Amended Petition for Rehearing, and in support thereof would show unto the Court as follows:

1. A review of petitioner's handwritten Petition for Writ of Certiorari in this cause (a copy of which was furnished counsel by the Clerk at the time of his appointment) reveals that the question of petitioner's illegal arrest was raised before this Court (see Petition pp. 4-5). This Court apparently was of the same opinion when it granted the writ in the first instance on May 27, 1968.

2. The record also reveals that the question of an illegal arrest was preserved at the trial court level (Appendix pp. 4-5, 6-7, 8-9).

3. While it is true that the issue of an illegal arrest was not specifically asserted in petitioner's brief before this Court because that question had not been apparently raised in the Supreme Court of

Florida, the fact remains that petitioner's brief before this Court laid out the facts demonstrating the illegality of the arrest (petitioner's brief pp. 4-5).

4. On further reflection it is apparent that the issue was not raised before the Supreme Court of Florida because it was not within the scope of the District Court of Appeal's certification to the Supreme Court which was to the effect that this cause "concerns a determination of when the denial of a preliminary hearing in violation of Section 901.23, Florida Statutes, is prejudicial to a defendant." (Appendix p. 34).

5. It is respectfully submitted that the petitioner should not be penalized by the deprivation of 20 years of his liberty as a result of the failure of his State Court counsel to pursue the illegal arrest issue. Questions affecting the constitutional rights of an individual which raise questions of fundamental error should be allowed to be raised at any time, where they appear on the face of the record. See Silber v. United States, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798. See also Ford Motor Company v. Department of Treasury of the State of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389, 396 (1945). (Issue with respect to the Eleventh Amendment of the Constitution of the United States was considered even though urged for the first time in the Supreme Court.) This is also the rule in Florida. See 2 Fla.Jur., Appeals, Section 290, pages 633-634 wherein the general rule is stated that "...a fundamental constitutional error may be urged for the first time in the appellate court." (The cases are collected in the footnotes to the above citation.)

6. That the arrest in question was clearly illegal is not open to doubt. The arrest of petitioner was made at his home at 1:30 in the

morning without a warrant. The record shows that the arrest was made approximately a month after the alleged offense and, therefore, it could not be based upon the theory that it was an arrest for an offense committed in the presence of the arresting officer.

7. The record also shows an absence of probable cause for the making of the arrest.

8. With respect to probable cause for making the arrest, it is true, on page 15 of the record, that the prosecuting witness was shown photographs and purported to pick one person out from the photographs, but at no point in the record does it appear that the person picked out was the petitioner, Carmine Vincent Palmieri. To paraphrase this Court in Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70, at 77, presuming probable cause from a silent record is impermissible.

9. A review of the transcript of oral argument will reveal that in a colloquy with Mr. Justice Stewart, counsel for the State conceded that the record failed to show probable cause for the arrest of the petitioner.

10. In this cause the record reveals that all of the evidence used against the petitioner was gathered by line-ups after the illegal arrest. It is true that the record reveals an in-court identification but this was made by the same person who had made the illegal line-up indentification and, as this Court pointed out in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, once a prosecuting witness has identified the accused in a line-up he is not likely to change his mind.

11. Evidence obtained during the detention resulting from an illegal arrest is excludable under the Due Process Clause and a conviction

based thereon cannot stand. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

WHEREFORE, this Court's recent order dismissing its Writ of Certiorari should be set aside and petitioner's conviction for armed robbery should be reversed.

Respectfully submitted,

PHILLIP GOLDMAN
14th Floor First National Bank Building
Miami, Florida 33131
Counsel for Petitioner

I certify that the foregoing Amended Petition for Rehearing is presented in good faith and not for purposes of delay.

PHILLIP GOLDMAN

Sworn to and subscribed before me this 12th day of December, 1968.

Notary Public, State of Florida at Large.
My commission expires:

Notary Public, State of Florida at Large
My Commission Expires Sept. 28, 1970
Bonded by Transamerica Insurance Co.

SUPREME COURT OF THE UNITED STATES

No. 131.—October Term, 1968.

Carmine Vincent Palmieri, Petitioner, *v.* State of Florida.	On Writ of Certiorari to the Supreme Court of Florida.

[December 9, 1968.]

Per Curiam.

The petitioner was convicted of robbery in the Criminal Court of Dade County, Florida, and the judgment of conviction was affirmed by the District Court of Appeal, 189 So. 2d 512, and the Supreme Court of Florida, 198 So. 2d 663. We granted certiorari because the case appeared to present a substantial constitutional question concerning the admissibility at trial of "lineup" identifications made after the petitioner was arrested without probable cause for the sole purpose of gathering evidence against him. — U. S. —. However, upon the complete review of the record that has now become possible, and in the light of oral argument by able and conscientious counsel, it has become evident that the legality of the petitioner's arrest was not at issue in the Florida appellate courts, and is not challenged here. Accordingly, the writ is dismissed as improvidently granted.

It is so ordered.